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No.

In the Supreme Court of the United States

October Term, 1980

FREDERICK WILLIAM DUEMIG,
Petitioner,

vs.

STATE OF COLORADO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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QUESTIONS PRESENTED FOR REVIEW

1. Was the extraction of blood samples from the Petitioner's body by means of force and violence, and after he was rendered irrational by a head injury, to be later used to convict him of vehicular homicide, a violation of due process under the Fourteenth Amendment?

2. Did the taking of Petitioner's blood by force and violence, without probable cause or a clear indication of being under the influence of intoxicating liquor, violate his right under the Fourth Amendment to be free from unreasonable searches and seizures?

3. Should *Breithaupt v. Abram,* 352 U.S. 432, and *Schmerber v. California,* 384 U.S. 757, which approved the intrusion of a suspect's body for the purpose of extracting body contents, without consent, and to be later used against him, be reexamined and overruled as condoning unlawful searches and seizures in violation of the proscriptions contained in the Fourth Amendment?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

The Petitioner, Frederick William Duemig ("Duemig"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Colorado entered in this proceeding on November 24, 1980.

OPINION BELOW

The opinion of the Supreme Court of Colorado is reported in 620 P.2d 240 (Colo. 1980), and appears in Appendix B.

JURISDICTION

The judgment sought to be reviewed was entered by the Supreme Court of Colorado on November 24, 1980. A timely petition for a rehearing was denied on January 5, 1981. Appendix C. The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, § 2101(e) and 20.1, Rules of the Supreme Court of the United States.

STATUTES

Colorado Revised Statutes, 1973 (1975 Cum.Supp.), § 18-3-106:

> 18-3-106. Vehicular homicide. (1)(a) If a person operates or drives a motor vehicle in a reckless manner, and such conduct is the proximate cause of the death of another, he commits vehicular homicide.
>
> (b) If a person operates or drives a motor vehicle, while under the influence of any drug or intoxicant, and such conduct is the proximate cause of the death of another, he commits vehicular homicide. This is a strict liability crime.
>
> (c) Vehicular homicide is a class 4 felony.
>
> (2) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood at the time of the commission of the alleged offense, or within a reasonable time thereafter, as shown by chemical analysis of the defendant's blood, urine, or breath, shall give rise to the following presumptions:
>
> (a) If there was at such time 0.05 percent or less by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was not under the influence of intoxicating liquor.

(b) If there was at such time in excess of 0.05 percent but less than 0.10 percent by weight of alcohol in the defendant's blood, such fact may be considered with other competent evidence in determining whether or not the defendant was under the influence of alcohol.

(c) If there was at such time 0.10 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcohol.

(3) The limitations of subsection (2) of this section shall not be construed as limiting the introduction, reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor.

STATEMENT OF THE CASE

On July 12, 1977, Respondent ("People") filed an information charging Duemig with vehicular homicide alleging that on June 26, 1977, he drove an automobile (Jeep) off a curve on a road near Estes Park, Colorado, causing a crash which resulted in the death of his 4-year-old daughter, Bree Duemig. The People charged that Duemig was under the influence of an intoxicant at the time of the occurrence.

Duemig, who had suffered a head injury, was taken by the local police to an Estes Park hospital where, as will be later described, blood samples were forcibly taken from his body.[1] A preliminary hearing was held on Sep-

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1. The accident took place in Larimer County, outside the jurisdiction of the Estes Park police. However, all of the force, violence, and abusive conduct charged here as violating Duemig's constitutional rights were acts of the Estes Park policemen. The investigating state trooper had no contact with Duemig while he was at the hospital.

tember 13, 1977. Probable cause to bind Duemig over for trial was found based largely upon the toxicologist's report of blood alcohol content amounting to 0.221 percent ethyl alcohol.[2]

A motion to suppress any evidence relating to specimens of Duemig's blood, and the Report of Alcohol Determination by the toxicologist, was filed by Duemig charging that the specimens were forcibly drawn without his consent after he had suffered a serious head injury, and while he was in a state of shock. He charged that such circumstances were violative of his privilege against self-incrimination, unreasonable search and seizure, and his right to due process of law.[3] The hearing on the motion to suppress was held on February 16, 1978 (Supp. folio pp. 102 *et seq.*). The evidence disclosed the following set of circumstances:[4] Terence Matuszak, an Estes Park policeman, identified an emergency room record he had signed as accurately reflecting Duemig's condition when admitted to the hospital emergency room. According to the record, Duemig had a scalp laceration, a hematoma and maceration of the left side of his head, it was bleeding, and his right forehead was abrased. The officer characterized

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2. In Colorado, preliminary hearings are very casual and informal proceedings, rarely lasting more than 25 or 30 minutes. All that was needed to bind Duemig over for trial was the fact of the accident, the death, the fact that he was driving, the locale, and the toxicologist's report. Rule 7(h), Colorado Rules of Criminal Procedure.

3. The self-incrimination allegation is not being pursued here since it was not brought up and fully argued below. *Schmerber v. California*, 384 U.S. 757.

4. It is noted that the opinion of the Supreme Court of Colorado does not detail all of the testimony presented at the suppression hearing. Its passing over of the crucial details has prompted us to be more explicit in presenting the facts. In order to dispel any doubts concerning the disturbing events that took place at the hospital, Duemig has requested the clerk of the state court to certify and transmit the record to this Courtt.

Duemig as a violent subject, uncooperative, and combative. He freely admitted restraint by police officers while the blood sample was being taken. The hospital report contained a diagnosis of head injury, large hematoma with profuse bleeding from the scalp, and a toe injury.

The officer graphically described Duemig as "ranting and raving". Other witnesses depicted him as being "angry," "confused," and "irrational." Matuszak claimed that he did not know what Duemig was going to do. One wittness pointed out that Duemig seemed to be "in and out."

It was conceded that Duemig was under restraint and handcuffed with his hands behind his back. Later, one cuff was removed as samples of Duemig's blood were withdrawn. The witnesses described the large amount of blood flowing from Duemig's head wound, and that he continued to bleed even as his blood was being withdrawn. Witnesses described blood as being all over the floor of the emergency room and on the table. Duemig kept trying to jump off the table and leave the room prior to the taking of blood. Time and again the emergency staff had to get him back on the table.

It was uncontroverted that Duemig at times was "just staring at the wall and everybody was kinda pretty much away from him." He was described as crying, screaming, and saying that he had killed his daughter. He resisted the taking of sutures. After Duemig's head had finally been sewn with sutures, an Estes Park policeman named Goold, for reasons known only to him, and who never testified, kept responding to Duemig's question as to where his daughter was by taunting: "You really did it this time, Fred."

Apparently goaded by this officer, being irrational and extremely disturbed, and because he was finally advised

of the death of his daughter, Duemig jumped off the table and went through the emergency room door where he was accosted by three Estes Park police officers in the hallway. There, a violent struggle ensued. Matuszak described how Duemig was bleeding at the time, and how he was picked up and forcibly thrown to the floor while still struggling. A head bandage was torn off Duemig's head. A witness described how Officer Goold stomped on Duemig's foot to bring him down. The trial judge commented on the injury when he made his findings in his order denying the motion to suppress. Appendix A. A nurse attested to the fact that Duemig was thrown to the floor, and his hands were then handcuffed behind his back. She affirmed that he was resisting all the time.

Duemig's brother testified without contradiction that as Duemig headed for the door, two officers turned to grab him by his arms. In the hallway, one jumped on Duemig's back, and they were "falling all over the place." The stomping then took place. Duemig's reaction to the stomping enabled the police to shove him to the floor. Duemig's bandage came off at that time, and he started bleeding again.

After the handcuffing, the officers pulled Duemig to his feet, and brought him back into the emergency room. A medical technician testified that when Duemig was brought back into the room, he was still irrational, still struggling, and didn't want anything put into him. It was undisputed that when the blood was finally withdrawn from his left arm, Duemig was still restrained with a cuff on his right wrist being held by an officer. The attendant stated that when the blood was drawn, Duemig had "calmed down," but was screaming, saying not to put anything in him, and he wanted to see his daughter. His head was still bleeding, and it was at that moment, still under

restraint, and immediately after the hallway struggle, that blood was withdrawn. A technician said Duemig "seemed" to be relaxed and cooperative when she was "taking something out." The record is barren of any evidence that Duemig was told what was being "taken out."

The blood sample was requested by one Turner, a Colorado state highway patrolman, who did not testify at the suppression hearing. There was no testimony such as finding liquor in the Jeep, smelling the odor of alcohol, or any of the other characteristic phenomena raising an indication of intoxication. The only evidence of any odor was that of medical personnel who testified Duemig smelled of gasoline.

It was admitted that no consent was given by Duemig to the taking of his blood, that his rights were not explained to him, nor was his consent requested. By way of explanation, officer Matuszak stated that "he was in no way understanding it."

In his oral findings, the trial court found that the taking of blood tests was not a violation of Article V of the United States Constitution as applies to self-incrimination, and that the status of Duemig at the hospital emergency room was such that there was the necessity for taking a blood specimen. He further found that Duemig attempted to leave the room, was thereafter forcibly restrained, and returned to the room. He found that Duemig was advised that a blood sample or blood specimen would be taken, and that there was no consent requested or given for the taking of blood.

The trial court further found that at the time Duemig had a serious head injury, became calm prior to the taking of blood, but was still under physical restraint at that time. It was found that although Duemig cooperated to

the extent of placing his arm in a position convenient for the taking of blood, he was at times not acting in a rational manner, and that a physical restraint was placed upon Duemig that included actions that resulted in an injury to his foot.

The trial court further found that the extraction of the blood specimen was done in a simple, medically-accepted manner in a hospital environment by a registered nurse. He concluded that "exigent circumstances" required the taking of blood before Duemig left the hospital, and that consent is not required under such circumstances. (Appendix A.) Duemig was later convicted.

The Supreme Court of Colorado affirmed, pointing out that the record supported the trial court's findings that the blood sample was taken in a hospital environment, and by a reasonable and medically-acceptable procedure. In spite of the undisputed testimony adduced at the suppression hearing, the court found that the blood was not drawn forcibly, and that Duemig "appeared" to understand and cooperate. (Appendix B.) This was directly contrary to Matuszak's testimony.

The court reached back to the preliminary hearing and stated that there was probable cause for the taking because the state trooper "[believed] that [the defendant] had been drinking and because of the seriousness of the accident." The record of the preliminary hearing does not enlighten us as to why the officer "believed" that Duemig had been drinking.

In the face of a suppression hearing record replete with questions aimed at whether there was any indication of drinking, the state court stated that Duemig did not raise the question of probable cause. It is noted that the trial court made a specific finding of probable cause. Ap-

pendix A. Also, in his suppression motion, Duemig alleged an unreasonable search and seizure violative of his Fourth Amendment rights (folio, p. 24).

After the suppression hearing clearly revealed no probable cause, the People brought in two new witnesses at the trial, one a different highway patrolman whom no one saw at the hospital, and had arrived at the accident scene after Duemig had been taken away, who said Duemig was intoxicated; and a retired nurse, not employed by the local hospital, who said she smelled alcohol at the scene. It is submitted that this weak attempt to shore up the People's case came too late to save the evidence, which should have been suppressed at the suppression hearing, and should not have been received in evidence at the trial.[5] Duemig reserved his grounds for suppression throughout the trial, and renewed his motion at the conclusion thereof. It was denied (folio 54).

The state court specifically held that the non-consensual withdrawal of a blood specimen did not violate Duemig's Fifth Amendment rights of self-incrimination, and that the collection of a blood sample does not constitute an unreasonable search and seizure citing *Schmerber v. California, supra.* Appendix B.

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5. Astonishingly, the state court's opinion goes on to say that Duemig never disputed the evidence of a clear indication that relevant evidence may be found by the taking of blood at the trial or in his motion for a new trial. As for the trial, the record will show that Duemig specifically reserved his motion to suppress and went into the subject of signs of intoxication in great detail. In his motion for a new trial, failure to suppress any evidence relating to Duemig's blood specimen made prior and during the trial, was alleged as error (folio p. 96).

ARGUMENT

A. The Extraction of Blood Samples From the Petitioner's Body by Means of Force and Violence and After He Was Rendered Irrational by a Head Injury, Later to Be Used to Convict Him of Vehicular Homicide, Was a Violation of Due Process Under the Fourteenth Amendment.

The testimony adduced at the suppression hearing graphically illustrates the determined effort by policemen to obtain a specimen of Duemig's blood regardless of the cost to his privacy, dignity as a human being, and possible harm to his mind and body. It is hard to conceive of any case more analogous to the narrow due process holding of *Rochin v. People of California,* 342 U.S. 165, with its attendant facts.[6]

Rochin involved a considerable struggle at the accused's residence after the officers had broken in, and had forcibly attempted to extract capsules which the accused had swallowed. He was arrested and taken to a hospital, but there is no evidence that he struggled there while a stomach pump was being inserted. (See Chief Justice Warren's dissenting opinion in *Breithaupt v. Abram,* 352 U.S. 432, 441.) Here, a more violent struggle took place at the hospital than is indicated in any phase of the *Rochin* statement of facts.

For its own reasons, the Colorado Supreme Court chose to gloss over the conduct of the Estes Park police officers who, it is submitted, had conducted themselves in a manner as shocks the conscience, and would arouse

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6. However, the case at bar does involve serious questions of probable cause and the clear indication rule. *Schmerber v. California,* 387 U.S. 757, 770. See *infra.*

the approbrium of all but a few members of our society who may harbor the notion that the obtaining of evidence, no matter how revolting the circumstances, is necessary to combat crime. The facts here are far more offensive than even those circumstances that offend the most fastidious, squeamish, or, private sentimentalist about combatting crime too vigorously. The conduct of the police officers was shocking, and it is suggested that few members of our society would not be similarly shocked if they were unfortunate to view the police activities in this case culminating in the obtaining of the blood samples.

The *Rochin* Court did not concern itself with Fourth or Fifth Amendment rights, such as unreasonable search and seizure and self-incrimination, limiting its holding to the due process rights of Rochin under the Fourteenth Amendment. The Court characterized the behavior of the police officers in *Rochin* as "brutal conduct" and pointed out that "nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." *Id.* 173, 174.[7]

Tracking close to the case at bar is *Breithaupt v. Abram, supra,* where blood extracted from an injured and unconscious man involved in a fatal automobile accident was received in evidence to convict him in a state court for involuntary homicide. At the trial, expert testimony was offered to establish that the defendant's blood contained 0.177 percent alcohol, so that by reason thereof, he was under the influence of intoxicating liquor. Affirming, this Court pointed out that the Fourteenth Amendment did not prohibit the use of evidence by a state obtained by unreasonable search and seizure violative of the Fourth

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7. Justices Black and Brennan, and we believe rightly so, would decide that the Fifth Amendment prohibition against self-incrimination should have been the bedrock of the *Rochin* decision.

Amendment.[8] Therefore, the question to be determined was whether the taking of blood by a qualified technician from an unconscious man was "conduct that shocks the conscience" or whether such a method of obtaining evidence offends one's "sense of justice."

The Court admitted that the Petitioner's assault on due process grounds "[was] not so easily unhorsed." *Id.* 435. Comparing the facts in *Breithaupt* with those of *Rochin* the Court found nothing comparable to the "brutal" and "offensive" conduct characterizing *Rochin,* and affirmed the conviction. Its sense of due process was not offended by the taking of blood, even without consent, under the conditions presented: an unconscious man having his blood extracted by a skilled technician in hospital surroundings. The Court's sense of justice was not affronted as in *Rochin.* The extraction of blood for a variety of reasons was considered inoffensive by even the most delicate since the blood test procedures had become routine in our everyday life. *Id.* at 436, i.e. applicants for military service, marriage licenses, college entrance requirements, and blood donors. However, the Court pointed out:

> This is not to say that the indiscriminate taking of blood under *different conditions* or by those not competent to do so may not amount to such "brutality" as would come under the *Rochin* rules. *Id.* 438. (Emphasis supplied.)

The taking of blood samples without consent was again before the Court in *Schmerber v. People of California, supra.* In *Schmerber,* a specimen of the defendant's blood was taken over his objection, but without the force and vio-

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8. *Breithaupt* was decided prior to *Mapp v. Ohio,* 367 U.S. 643.

lence found in *Rochlin,* or the unconscious driver in *Breithaupt.* Because there was nothing in the procedures offending one's sense of justice as in *Rochin,* the Court rejected the petitioner's due process claim. The Court went on to reject his assertion that the taking and use of the specimen to convict him of drunken driving violated the Fifth Amendment privilege of any person not to "be compelled in any criminal case to be a witness against himself." It was held that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature, and that withdrawal of blood, and use of an analysis of such blood, did not involve the compulsion prohibited by the Fifth Amendment.[9]

While the Court gives gloss to *Breithaupt* and *Schmerber* procedures in obtaining blood specimens for later evidentiary use, the Court warned:

> We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reached this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.* 772.

E.g. *Bell v. Wolfish,* 441 U.S. 520, 560, where the Court, in affirming the procedures used by prison guards

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9. The Court was compelled to examine the Petitioner's Fifth Amendment claim because of the intervening case of *Mapp v. Ohio, supra,* which extended the proscriptions contained in the Fifth Amendment to the states.

in searching prisoners, stated that it recognized that a search may be conducted in an abusive fashion. Referring to *Schmerber,* the Court pointed out that such abuses cannot be condoned, and the searches must be conducted in a reasonable manner.

It is submitted that *Rochin* is determinative here, and that all the evidence relating to the blood specimens withdrawn from Duemig should be suppressed. The failure to do so violated the mandate of this Court as clearly delineated in *Rochlin* and *Schmerber,* and irreconcilably conflicts with these applicable decisions.

B. The Taking of Petitioner's Blood by Force and Violence, Without Probable Cause, or a Clear Indication of Being Under the Influence of Intoxicating Liquor, Violated His Right Under the Fourth Amendmen to Be Free From Unreasonable Searches and Seizures.

The state court found evidence of probable cause at the preliminary hearing and the trial. There was no way to make such a finding for the withdrawal of Duemig's blood for analysis in the evidence presented at the suppression hearing. This was glossed over by holding that probable cause was not an issue in that hearing. We have heretofore pointed out the court's error, and submit that the trial court squarely met the issue and ruled against Duemig. Appendix A.

> *Schmerber* laid down a two-pronged rule regarding intrusions into one's body: "We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcoholic content, the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but

> against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to subject to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." *Id.* 768.

In *Schmerber,* the Court had no difficulty finding probable cause for the arrest of the petitioner, and charging him with drunken driving. The officer smelled liquor on his breath, and testified that his eyes were "bloodshot, watery, sort of a glassy appearance." These symptoms were still apparent at the hospital when the officer placed the petitioner under arrest, read him his rights, and ordered the blood specimen. *Id.* 768, 769.

In the instant case, no such evidence appeared anywhere in the record until the trial to a jury. As heretofore stated, two witnesses at that time attempted to establish probable cause, but it was too late. The suppression hearing was completed without a scintilla of evidence giving the police justification to force Duemig to take the blood test. There is little more to say since the record speaks for itself.

The Colorado Supreme Court has not been consistent in this area. In *People v. Williams,* 192 Colo. 294, 557 P.2d 399 (1976), a homicide case, the suspect refused to submit to a blood test, but later permitted such test after she had been told that she had no choice. The court held that to justify an internal search without consent or a warrant, there must be a "clear indication" that the defendant was intoxicated. Mere suspicion uncorroborated by the familiar signs of intoxication is insufficient. Relying heavily on *Schmerber,* the court found that evidence

that the suspect had been drinking in a bar shortly before the homicide, and that a policeman had reported "smelling alcohol" on her breath at the hospital, fell short of meeting the clear indication standard, another way of stating probable cause. It is an anomaly that the same court can find an unreasonable search and seizure under the rather bland set of circumstances presented in *Williams*, and declines to do so under the turbulence and violence disclosed by the record in this case. The state court displays extraordinary inconsistency when it explores human dignity as defined in a number of quotations from *Schmerber*, suppresses the evidence in *Williams* with a suspect that never resisted, and refuses to do so in a case such as now presented before this Honorable Court, saying in passing, that Duemig relaxed for a moment and allowed a withdrawal. Cf. *Mincey v. Arizona*, 437 U.S. 385, where the Court disapproved unrelenting mental and emotional pressure upon an injured man which finally resulted in incriminating statements.

It is respectfully suggested that granting judicial gloss to the police misconduct in this case, which would in turn approve searches and seizures based on the mere chance that incriminating evidence may be found, is inconceivable. Duemig's Fourth Amendment rights against unreasonable search and seizures, coupled with *Rochin* Fourteenth Amendment due process violations, warrants the granting of the petition for the purpose of delineating the perimeters of these rights within the body intrusion context, and with finality. Otherwise, this sort of thing will happen again and again without any meaningful protection to an accused, and without guidelines to law enforcement officials and the courts.

C. Breithaupt v. Abram, 352 U.S. 432, and Schmerber v. California, 384 U.S. 757, Which Approve the Intrusion of a Suspect's Body for the Purpose of Extracting Body Contents, Without Consent, to Be Later Used Against Him, Should Be Overruled.

Breithaupt and *Schmerber* have created a distinction between what is termed "testimonial" and "communicative" evidence and evidence obtained by intrusions of the body—by the extraction of bodily fluids and contents later put into evidence. We suggest that this distinction is untenable, and warrants reexamination by the Court. Apropos the case at bar, in the absence of consent by Duemig, no blood should have been extracted even if he had not resisted. Relating back to *Breithaupt* and *Schmerber*, there appears to be no justifiable reason for the extraction of blood from an unconscious man, and from an unwilling donor, by simply characterizing the evidence so obtained as not "testimonial" or "communicative" in nature. It is difficult to perceive any difference between invading a person's body without permission, and compelling an unwilling person to speak in violation of his Fifth Amendment rights, or seizing his papers and documents in a manner violative of the Fourth Amendment. In fact, the non-consensual invasion of an individual's body appears more reprehensible than the constitutionally impermissible forcing of an individual to speak or give up incriminating papers or objects. When force is used, as in this case, this notion becomes abhorrent. What the Court has done is develop an artifical distinction on the one hand, when no force is used, and to handle each case on a case-by-case basis when force approaching or overtaking *Rochin* is employed. There should be no distinction between *types* of searches and seizures leading to a rule which would eliminate the task of having to decide whether a given case falls on one side of the prohibited line or the other. All

non-consensual body intrusions should be condemned as unlawful searches and seizures.

It seems ludicrous that blood taken from an unconscious man should be admissible against him because not taken with force, even though he lacks the capacity to consent, refuse consent, or resist. *Breithaupt v. Abram, supra.* An individual may refuse to speak or give up papers, but if he declines a blood withdrawal, and it is taken anyway, he presently lacks the protection given to speech and the delivery of documents and things. Again, the situation appears indefensible.

Breithaupt involved an assault on an unconscious man. The decisions hold that the police violate due process when they use brutal methods to obtain evidence from an individual, and use it to convict him. *Rochin v. California, supra; Chambers v. Florida,* 309 U.S. 227; *Brown v. Mississippi,* 297 U.S. 278. It is submitted, however, that the concept of due process is not limited to a prohibition of the use of brute force against an accused. See *Leyra v. Denno,* 347 U.S. 556, where the Court set aside a conviction where subtle and non-violent methods were used to exact a confession from a prisoner.

An analysis of *Breithaupt* seems to indicate that there would be a violation of due process if the blood had been withdrawn after a struggle with the police. But, we fail to comprehend why the sanctity of the human body is not equally violated when the accused is unable to offer resistance to invasion of his body, and where he is able to resist and force is necessary to overcome his resistance. In the latter case, this is a violation of due process. *Rochin v. California, supra.* Nor, do we perceive a distinction where a suspect without physical resistance, but with objections, is compelled to give incriminating blood samples. *Schmerber v. California, supra. Breithaupt* and *Schmerber* involved involuntary extraction of contents of the human

body, and should be condemned as unreasonable searches and seizures. There should be no line drawn between involuntary extraction of words from a person's lips, the involuntary extraction of the contents of his stomach, and the involuntary extraction of fluids from his body, when the evidence obtained is used to convict him—with or without probable cause.

If the level of decency in a civilized nation is the test, it is revolting that the police be permitted to insert needles into unconscious people, unwilling people, and resisting people, to obtain evidence to convict them. Each situation is the same—whether the person is unconscious, given a pill to put him to sleep, or resorting to force to subdue. For, as Justice Douglas said in his dissent in *Breithaupt,* "the indignity of the individual is the same in one case as in the other, for in each is his body invaded and assaulted by the police who are supposed to be the citizen's protector." *Id.* 444. Thus, it is urged that the physical resistance, and the use of force and violence, as demonstrated in the instant case, should be irrelevant. Invasion of the human body should be consensual or there should be no invasion at all. Characterizing a method used to extract body substances as scientific, or in common use, has no relevancy, and is not supported by the plain language of the Fourth Amendment. Such intrusions remain unreasonable searches and seizures.

The stomach pump of *Rochin,* the needle in *Breithaupt* and *Schmerber,* the use of an enema, or whatever devices can be conjured up, all stand on the same footing where consent is lacking, and should be uniformly condemned and categorized as being as reprehensible to our system of laws, and our spirit of decency, as the rack, the screw, and the third-degree.

We are cognizant that this case can be disposed of on the teachings of *Rochin,* and statements contained in

Schmerber, but nevertheless, because of the importance of the broader question of body intrusions as being accorded Fourth Amendment proscriptions, it is submitted that the brutal facts of this case should compel the Court to focus on *Schmerber* and *Breithaupt* in order to determine whether they should continue to set the standards of law enforcement officers faced with this problem. If these cases stand, and the instant case becomes representative of the law, further and perhaps even greater incursions and abuses will be its progeny.

CONCLUSION

This case represents extreme violations of the right of an individual to be secure in his person, his dignity, and free of abusive and violent invasions thereof by policemen. Due process was violated in the extreme, and want of probable cause obvious. Therefore, all evidence relating to the blood forcibly extracted from Duemig's body, without even a pretence of asking for a consent, should have been suppressed. Since the *Rochin* context of bodily invasion is again before the Court, and in a more brutal fashion, it is urged that the Court accept this case, and lay down strong and persuasive guidelines for the courts and law enforcement officers.

Lastly, *Breithaupt v. Abram, supra,* and *Schmerber v. California, supra,* should be overruled, and that all nonconsensual intrusions into the human body, however the means, be declared unreasonable searches and seizures in violation of the Fourth Amendment as applied to the states through the Fourteenth Amendment.

It is respectfully requested that the Court issue the writ.

Respectfully submitted,

JOSEPH P. JENKINS

APPENDIX

APPENDIX A

March 6, 1978
Monday morning
9 a.m.

PROCEEDINGS:

THE COURT: Criminal Action No. 77-246, People of the State of Colorado v. Frederick William Deumig.

This matter was last before the court on February 16, 1978, at which time a Motion to Suppress was heard. The court took the matter under advisement.

The record should reflect the appearance of Frederick William Deumig, together with his attorney, Mr. Joseph Jenkins, the people being represented by Mr. Rusty Nichols.

The court makes the following finding of facts and conclusions of law regarding the Motion to Suppress. The record should reflect that the Motion to Suppress was based upon the grounds that the blood specimen at the time that it was taken "was drawn forcibly and without Defendant's permission after Defendant had suffered a serious head injury, while he was in a state of shock, and under circumstances which, if the specimen is not suppressed, will deny Defendant due process of law under the Fourteenth Amendment, as well as specific guarantees of the Bill of Rights, secured against the States by that amendment: His privilege against self-incrimination under the Fifth Amendment, and his right not to be subjected to unreasonable searches and seizures of the Fourth Amendment."

The court makes a determination as to the allegation of self-incrimination that the statute, or the case law is to the effect at the present time that blood tests are not testimony of defendants, and thus its taking is not a violation of Article V of the United States Constitution as applying to self-incrimination, or of Article II of Section 18 of the Colorado Constitution under the determination in *Schmerber v. California.*

Although probable cause was not raised by the motion, the court finds there was probable cause to arrest and to require blood-taking based upon the circumstances of this case, in which there was an accident and which there was evidence that the defendant was driving, and the status of the defendant at the hospital emergency room was such that there was necessity for taking blood, blood specimen.

The defendant was at the hospital at about 9:30 p.m. after an accident in which a person had died. The defendant attempted to leave the hospital after he was advised that X-rays were necessary.

The defendant, after leaving the emergency room, was forcibly restrained and returned to the emergency room.

In the emergency room he was advised that a blood sample or blood specimen would be taken. There was no consent requested or given to the taking of blood.

At the time, the defendant had a serious head injury. Defendant became calm prior to the taking of blood but was still under physical restraint at the time of taking the blood. Although he did cooperate to the extent of placing his arm in a position convenient for the taking of blood, and prior to the taking of blood defendant was at times not acting in a rational manner, there was physical, as stated, physical restraint placed upon the defendant,

which included actions that resulted in an injury to the defendant's foot.

However, the extraction of the blood specimen was done in a simple medically-accepted manner in a hospital environment by a registered nurse.

Exigent circumstances required the taking of blood before the defendant left the hospital, and as a conclusion of law consent is not required to the taking of blood under these circumstances, although the procedure must be reasonable and medically acceptable. And the court finds that under the circumstances of this case the procedure was reasonable and medically acceptable.

The Motion to Suppress is denied.

APPENDIX B

IN THE SUPREME COURT OF COLORADO

No. 79SA150

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

v.

FREDERICK WILLIAM DUEMIG,
Defendant-Appellant.

November 24, 1980

Appeal from the District Court in and for the County of Larimer
Honorable John A. Price, District Judge

EN BANC JUDGMENT AFFIRMED

Stuart A. Van Meveren, District Attorney, Eighth Judicial District

Donald E. Johnson, Jr., Chief Deputy District Attorney
Fort Collins, Colorado
Attorneys for Plaintiff-Appellee

Joseph P. Jenkins, P.C.
Estes Park, Colorado
Attorneys for Defendant-Appellant

JUSTICE DUBOFSKY delivered the Opinion of the Court.

Frederick W. Duemig appeals his jury conviction for vehicular homicide[1] because the trial court allowed into

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1. The defendant was placed on probation for five years, was fined the sum of $2,000.00 (of which the sum of $1,500.00 was suspended) and was directed to pay the cost of supervision fees.

evidence the results of a blood alcohol test performed on a sample of his blood obtained while he was in the Estes Park Hospital emergency room for treatment of injuries suffered in an automobile accident. The defendant had moved to suppress the results of the blood test, alleging that his blood sample was taken under circumstances which violated the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. We affirm the defendant's conviction.

About 9:00 p.m. on June 26, 1977, the defendant was driving on Mary's Lake Road, south of Estes Park, when his 1960 Willys Jeep went off the right-hand side of the road and rolled down a short, steep embankment. The defendant was found near the jeep and taken to the hospital emergency room. As the jeep overturned, it crushed his three-year-old daughter, and she died at the scene of the accident.

Hospital personnel treated the defendant for scalp lacerations and a concussion. The defendant's behavior in the emergency room was erratic: he had difficulty lying still, and he was dazed, confused, and highly emotional after learning of his daughter's death. After the defendant's head injuries were treated, he left the emergency room, ostensibly to go to the x-ray room. Instead, he attempted to leave the hospital, and three law enforcement officers restrained him. A scuffle ensued. The police cuffed the defendant's hands behind his back and returned him to the emergency room.

The police seated the defendant on one of the treating tables and removed a handcuff from one arm to enable the medical technician to take a blood sample. The medical technician testified that the defendant did not want an injection, but when she explained that she was taking a blood sample, he stopped fighting, relaxed, and cooperated.

The blood sample analysis determined that the defendant's blood contained 0.221 per cent ethyl alcohol at the time the sample was withdrawn.

The defendant was charged by information with vehicular homicide under section 18-3-106, C.R.S. 1973 (now in 1978 Repl. Vol. 8), which provides:

> "(1)(b) If a person operates or drives a motor vehicle, while under the influence of any drug or intoxicant, and such conduct is the proximate cause of the death of another, he commits vehicular homicide.
>
> . . .
>
> "(2) In any prosecution for a violation of subsection (1) of this section, the amount of alcohol in the defendant's blood at the time of the commission of the alleged offense, or within a reasonable time thereafter, as shown by chemical analysis of the defendant's blood, urine, or breath, shall give rise to the following presumptions: . . . (c) if there was at such time 0.10 percent or more by weight of alcohol in the defendant's blood, it shall be presumed that the defendant was under the influence of alcohol."

At trial, the defendant maintained that his daughter's death was proximately caused by a defect in the jeep's steering. The defendant produced expert testimony and testimony from the prior owner of the jeep that the vehicle had a faulty steering mechanism which frequently caused the steering to catch, pulling the vehicle in one direction or the other. Although the defendant could not recall the accident or his treatment in the emergency room, he testified that he remembered his vehicle veering to the right.

On appeal, the defendant contends that the trial court improperly denied his motion to suppress the results of the blood test and his request for an instruction that the

statutory presumption based on blood alcohol content could be overcome by other evidence that he was not under the influence of intoxicating liquor; that the vehicular homicide statute is unconstitutional because it does not include guidelines for the taking of a blood sample; and that the jury verdict was not supported by the evidence. We disagree.

Both at the hearing on his motion to suppress the results of the blood test and at trial, the defendant charged that his blood specimen was drawn forcibly and without his permission after he had suffered a head injury, while he was in a state of shock, and under circumstances which violated his constitutional privileges against self-incrimination, unreasonable search and seizure, and due process of law. The trial court ruled that the blood sample was taken in a hospital environment by a procedure which was reasonable and medically acceptable and denied the defendant's suppression motions. The record supports the court's ruling.

Because blood tests are not testimony of the defendant, the non-consensual withdrawal of a blood sample does not violate the defendant's Fifth Amendment protection against self-incrimination or *Colo. Const.* art. II, sec. 18. *Schmerber v. California,* 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *People v. Brown,* 174 Colo. 513, 485 P.2d 500 (1971). Nor does collection of a blood sample constitute an unreasonable search and seizure under the Fourth Amendment to the United States Constitution or *Colo. Const.* art. II, sec. 7. *Schmerber v. California, supra; People v. Brown, supra.*

The defendant acknowledges that a blood sample may be taken without his consent, but he argues that the circumstances of the taking here were violent and shocked the conscience within the meaning of *Rochin v. California,*

342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952).[2] The record of the venipuncture performed in this case does not disclose that the means used were so patently offensive as to shock the conscience. Although the defendant's conduct was periodically irrational, and the police officers used force to restrain the defendant and keep him in custody, the blood was not drawn forcibly, and the defendant appeared to understand and cooperate in the blood test.

The defendant's motion to suppress the results of the blood test was based upon the conditions surrounding collection of the blood sample. At the end of the suppression hearing, although the question of probable cause had not been raised by the defendant, the trial court found that there was probable cause to arrest the defendant and to compel the withdrawal of a blood sample. Not until his reply brief was filed in this appeal did the defendant argue that his blood sample was taken in violation of the standard requiring a "clear indication" that a blood test will disclose relevant evidence. *People v. Williams*, 192 Colo. 249, 557 P.2d 399 (1976).

At the preliminary hearing, the chief investigating officer for the Highway Patrol testified that he ordered a blood sample because "it was believed that [the defendant] had been drinking and because of the seriousness of the accident." The defendant's motion to suppress focused on the circumstances existing in the emergency room when the blood sample was obtained, and all of the testimony at the hearing on the motion concerned what happened in the emergency room.

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2. In *Rochin*, an emetic solution was forced down the defendant's throat to induce him to regurgitate two capsules police had seen him swallow when they entered his room. The capsules, which contained morphine, were subsequently admitted as evidence in the defendant's trial on narcotics charges.

At trial, the defendant renewed his objection to the admission of the results of the blood test. A registered nurse who examined the defendant at the scene of the accident, a Larimer County deputy sheriff, an Estes Park police officer, and a Highway Patrol supervisory officer all testified that the defendant appeared intoxicated at the scene of the accident or in the emergency room of the hospital. The emergency room physician testified that he suspected possible intoxication,[3] but the medical technician who drew the blood sample said that the emergency room smelled of gasoline as a result of the accident, and that she did not smell any intoxicating beverages on the defendant's breath. The defendant testified that he drank two beers at a barbecue which preceded the accident.

Neither at trial nor in his motion for a new trial did the defendant dispute the existence of a clear indication that relevant evidence would be disclosed by the blood test. We have held time and again that we will not review contentions of error raised for the first time on appeal unless the error is fundamental. *Dorador v. Cronin,* ..... Colo. ....., 605 P.2d 53 (1980); *People v. Pickett,* 194 Colo. 178, 571 P.2d 1078 (1977); *Mathis v. People,* 167 Colo. 504, 448 P.2d 633 (1969). In any event, our review of the trial record discloses ample evidence that the police had a clear indication that relevant evidence of intoxication would be found when they ordered a sample of the defendant's blood. *People v. Williams, supra.*

The defendant objects to the jury instruction, based on section 18-3-106(2), C.R.S. 1973 (1978 Repl. Vol. 8), that a blood alcohol level of 0.10 per cent creates a presumption that the defendant is under the influence of alcohol.

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3. The doctor testified that the defendant's behavior symptoms were consistent with a head injury and with intoxication, but it was difficult to separate the signs of intoxication from the symptoms of head injury.

The defendant maintains that the jury should have been instructed also on the basis of section 18-3-106(3), C.R.S. 1973 (1978 Repl. Vol. 8), that the statutory presumptions "shall not be construed as limiting the introduction, or reception, or consideration of any other competent evidence bearing upon the question of whether or not the defendant was under the influence of intoxicating liquor." The defendant, however, did not tender an instruction to the court which included this provision of subsection (3). Moreover, had such an instruction been tendered, the trial court would not have been required to accept it. Subsection (3) pertains to the admissibility of evidence of intoxication other than a blood test, not evidentiary significance the jury should accord such evidence. Furthermore, the trial court instructed the jury that the defendant was presumed innocent, that the People had the burden to prove the defendant guilty beyond a reasonable doubt, and that a presumption remains "unless and until outweighed by evidence to the contrary."[4]

The defendant also maintains that the vehicular homicide statute violates the Fourteenth Amendment to the United States Constitution and *Colo. Const.* art. II, sec. 25 because the statute does not incorporate the procedural safeguards set out in the statute governing driving a motor vehicle while under the influence of intoxicating liquor, section 42-4-1202, C.R.S. 1973: specifically, the right to refuse a blood test and the procedures circumscribing blood sample withdrawal. Although the defendant's challenge is based on alleged due process infirmities, the gist of his claim is that the vehicular homicide statute denies him

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4. The defendant also requested *Colorado Jury Instruction (Civil)* 3.3: "Any finding of fact you make must be based on probabilities, not possibilities. They may not be based on surmise, speculation, or conjecture." The trial court properly rejected this request because the court instructed the jury that it was the People's burden, beyond a reasonable doubt, to prove the defendant guilty.

safeguards available to persons charged with drunk driving. Thus, his constitutional challenge may be characterized more accurately as a denial of equal protection. We rejected an identical equal protection challenge to the vehicular homicide statute in *People v. Myers,* ..... Colo. ....., 599 P.2d 891 (1979), where we held that because the death of another is an essential element of vehicular homicide, but not of driving under the influence, the offenses proscribe dissimilar conduct and a person prosecuted under the vehicular homicide statute is not situlated similarly to a person charged with driving under the influence. The General Assembly may, therefore, legitimately decline to extend the privilege to refuse a blood test granted by section 42-4-1202, C.R.S. 1973, to persons accused of vehicular homicide. *People v. Myers, supra.*

Finally, the defendant questions the sufficiency of the evidence supporting his conviction. There is no question that the defendant was the driver of the vehicle at the time of the accident, and that an individual died because of the accident. The blood test result indicated sufficient alcohol to trigger the statutory presumption of driving under the influence. While the defendant presented testimony that faulty steering was the cause of the accident, the jury verdict was supported by evidence that the cause was the defendant's intoxication.

Where the sufficiency of the evidence to support a guilty verdict is challenged, we must view the testimony in the light most favorable to the prosecution. *People v. Bennett,* 183 Colo. 125, 515 P.2d 466 (1973); *People v. Waggoner,* 196 Colo. 578, 595 P.2d 217 (1979); *People v. Rivas,* 197 Colo. 131, 591 P.2d 83 (1979). If there is sufficient competent evidence establishing each of the essential elements of the crime charged, we may not overturn the jury's guilty verdict despite conflicts in the evidence. *People v. Jones,* 191 Colo. 110, 551 P.2d 706 (1976).

The judgment is affirmed.

APPENDIX C

IN THE SUPREME COURT OF THE
STATE OF COLORADO

No. 79SA150

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,

vs.

FREDERICK WILLIAM DUEMIG,
Defendant-Appellant.

Appeal from the District Court
of Larimer County

Upon consideration of the Petition for Rehearing filed by the Defendant-Appellant in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, JANUARY 5, 1981.

(SEAL)